resulting in the expulsion of the plaintiffs until their full term had expired. And the rest of the resolutions would also have the same effect. It was said that the Committee had the power to act in any manner it liked because under Article 9 the highest authority of the Association was the members General Meeting. But, with great respect, the Constitution was meant for the articulate and the law abiding, not dictators, which meant that in pursuing their aims and object it must be presumed that the Constitution would be read in such a way as not to affect the right to act of those upon whom the members have themselves placed their trust and confidence. Consequently the Special General Meeting's power under Article 9 must be presumed to be exercised as not to defeat if not nullify the effort of the directors to execute the proper resolutions of the General Meeting under Article 13(a) or to manage the daily affairs of the Society under Article 13(c) otherwise Article 9 could be read to enable a group of people to get together to dethrone the governing body for the flimsiest of reasons. If the General Meeting was to have such sweeping powers, then it must (if the Registrar so permits) clearly, categorically and expressedly by necessary amendment, so provide in the Constitution. It was also said that the Special General Meeting could dismiss the encumbent Committee because the Special General Meeting was empowered under the article to elect the Committee. But how conceivably could a new Committee be appointed unless and until the encumbent one was removed? But if it needed an express provision under Article 36 to remove the trustee, could we seriously imagine the governing body itself could be removed without such express power. I have my greatest doubts. It may well be asked what for was then the power to elect given to the Committee at the Special General Meeting. But an election did not necessarily arise merely because the directors were removed. It could arise because there had been a casual vacancy caused by the death of the members or resignation *en bloc* of the whole committee or the inability of the Committee Member or members to act. In such a situation the cause for an election might well arise at a Special General Meeting.

In the circumstances, I would declare therefore that the resolutions made by the defendants were null and void and of no effect. I would therefore make the consequential order that the interim injunction imposed on the plaintiff be discharged and order that the defendants be restrained from interfering with the plaintiffs in the use or enjoyment of the offices of the Society.

Order accordingly.

Solicitors: *Datuk Morris Edgar and Thuraisingham; Mahinder Singh Dulku.*

TENGKU NIK MAIMUNAH & ANOR. v. MAJLIS UGAMA DAN ADAT MELAYU NEGERI TRENGGANU & ORS.

[O.C.J. (Harun J.) April 15 and July 24, 1978]
[Kuala Trengganu — Civil Suit No. 80 of 1970]

Islamic Law — Wakaf Khas — Validity of — Federal Constitution, art. 3(2) and 9th Schedule List II — Trengganu State Constitution, arts. III, IV and XII — Trengganu Wakaf Validating Enactment, 1972 — Administration of Islamic Law Enactment, 1955, Trengganu, ss. 2, 59, 60 and 61.

Constitutional Law — Muslim religion — Federal Constitution, art. 3(2) & 9th Schedule List II — Trengganu State Constitution arts. III, IV and XII.

In this case the first plaintiff on June 13, 1961 made a document purporting to be a *wakaf* by which she made a number of dispositions in favour of her relatives and the balance to various religious and charitable objects. Subsequently she wrote to the Commissioner of Religious Affairs, Trengganu, to revoke the *wakaf*. In this suit she sought a declaration that the said purported *wakaf* was void.

Held: (1) the validity of the *wakaf* in this case must be determined in accordance with the Muslim law as professed and practised in the State of Trengganu and subject to any rules as to its administration that may be regulated by the State laws of Trengganu, including the Administration of Islamic Law Enactment, 1955 and the Islamic *Wakaf* Validating Enactment, 1972;

(2) the *wakaf* in this case has been validated by section 3 of the Islamic *Wakaf* Validating Enactment, 1972 subject to rights, titles, obligation or liability created before August 8, 1972;

(3) by virtue of section 61 of the Administration of Islamic Law Enactment, the *wakaf* was valid only in respect of a third of her property as on June 13, 1961.

Cases, referred to:-

(1) *Commissioner for Religious Affairs* v. *Tengku Mariam* [1970] 1 M.L.J. 222.

(2) *Tengku Mariam & Anor.* v. *Commissioner for Religious Affairs, Trengganu & Ors.* [1969] 1 M.L.J. 110.

CIVIL SUIT.

Peter Mooney (*Kirpal Singh Brar* and *Haji Hassan Ishak* with him) for the plaintiff.

S.T. Chung for defendants 6, 7, 9, 11, 12, 13, 14, 15 and 20.

Cur. Adv. Vult.

Harun J.: This case concerns a *wakaf* created by Tengku Nik Maimunah Hajjah binti Almarhum Sultan Zainal Abidin of Trengganu where the plaintiffs claim *inter alia:*

"A declaration that the said purported *wakaf* is void."

The agreed facts are as follows: —

1. On Sunday 22 Muharram 1324 (Al Hijjrah) corresponding to March 18, 1906, the late Sultan Zainal Abidin of Trengganu, made a grant of the lands known as the Chenderong Concession to his daughter, the first plaintiff, Tengku Nik Maimunah and her husband Tengku Ngah Omar bin Abdul Rahim, in equal shares.

2. On the death of her husband the first plaintiff became by Islamic Law the owner of an undivided 5/8 share in the Chenderong Concession.

3. On June 13, 1961 the first plaintiff made a document which purports to be a *Wakaf*. The instrument is in Malay in the Jawi script and was registered in the office of the Majlis Ugama dan Adat Melayu,

Trengganu, (The Council of Religion and Malay Customs).

4. On July 21, 1970 the first plaintiff wrote to the Commissioner for Religious Affairs, Trengganu to revoke the *Wakaf*.

5. On August 30, 1970 the first plaintiff executed an Instrument of Surrender whereby she purported to surrender her share in the Chenderong Concession to the second plaintiff.

6. On November 26, 1970 the first plaintiff commenced these proceedings.

7. On February 1, 1971 a *Fetua* on the validity of the *Wakaf* by the Mufti of Trengganu was published in the *Government of Trengganu Gazette* in accordance with section 21(3) of the Administration of Islamic Law Enactment, 1955.

8. On February 2, 1971 by Order of the High Court at Kuala Trengganu the first plaintiff withdrew allegations against the first defendant, Majlis Ugama dan Adat Melayu Trengganu and the first defendant conceded to judgment in this cause.

9. On April 6, 1971 the first plaintiff died at the age of 87 years.

10. On May 16, 1971 by Order of the High Court at Kuala Trengganu, the second plaintiff was added as a party and the proceedings continued between the second plaintiff and the remaining defendants Nos. 6, 7, 9, 11, 12, 13, 14, 15 and 20.

11. On August 8, 1972, the Islamic *Wakaf* Validating Enactment, 1972 passed by the Trengganu State Legislative Assembly on July 22, 1972 became law.

12. The first plaintiff, Tengku Nik Maimunah was a Muslim resident in the State of Trengganu until her death and defendants Nos. 2 to 39 all professed the religion of Islam.

A *Wakaf* is a Muslim trust settlement of property for religious or charitable purposes. It follows therefore that Part VII of the Civil Law Act, 1956 relating to disposal and devolution of property applies and in particular section 25 which reads:

"Nothing in this Part shall affect the disposal of any property according to Muslim law or, in Sabah and Sarawak, native law and custom."

What then is the Muslim law applicable to this case. The relevant provisions on Muslim law in the Federal and State Constitutions are:

The Federal Constitution:

Article 3(2).

"In every State ... the position of the Ruler as the Head of the Muslim religion in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired;"

Article 73.

"In exercising the legislative powers conferred on it by this Constitution —

(b) the Legislature of a State may make laws for the whole or any part of the State."

Article 74(2).

"Without prejudice to any power to make laws conferred on it by any other Article the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List."

Ninth Schedule, List II — State List:

"1. Except with respect to the Federal Territory, Muslim Law and personal and family law of persons professing the Muslim religion, including the Muslim Law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; *Muslim Wakafs and the definition and regulation of charitable and religious trusts,* the appointment of trustees and the incorporation of persons in respect of Muslim religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay custom; Zakat, Fitrah and Bait-ul-Mal or similar Muslim revenue; mosques or any Muslim public place of worship, creation and punishment of offences by persons professing the Muslim religion against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Muslim courts, which shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the Muslim religion; *the determination of matters of Muslim Law and doctrine* and Malay custom."

The Trengganu State Constitution:

Article III.

"The Religion of the State shall be the Muslim Religion heretofore professed and practised in the State."

Article IV(1).

"The Head of the Religion of the State shall be His Highness and the Majlis Ugama dan Adat Melayu, in English the Council of Religion and Malay Customs, constituted under the existing State law shall continue to aid and advise His Highness in accordance with such law."

Article XII(2).

"His Highness may act in His discretion in the performance of the following functions (in addition to those in the performance of which He may act in His discretion under the Federal Constitution), that is to say —

(d) any function as Head of the Muslim Religion or relating to the custom of the Malays."

Article XII(3).

"State law may make provision for requiring His Highness to act after consultation with or on the recommendation of any person or body of persons other than the State Executive Council in the exercise of any of His functions other than —

(a) functions exercisable in His discretion; and

(b) functions with respect to the exercise of which provision is made in the State Constitution or the Federal Constitution."

The 1911 Constitution known as "The Constitution of the Way of Illustrious Sovereignty" —

Chapter Two:

"The Raja who governs Trengganu must always be of the Mohammedan religion and of the Malay race and of the lineage and descent of the Sultans of Trengganu. ..."

Chapter Fifty-one:

"Whereas it has been asserted and laid down and established that for all time this Government of Trengganu is of the comity of Islam in Malaya that is it is called the State and Official religion, no other religion whatever may be set up or referred to as the State religion, however many of other races or creeds are protected and allowed to shelter in the State and provinces of Trengganu."

It may be observed that the 1911 Constitution was promulgated by Sultan Zainal Abidin the Third, the father of the first plaintiff and witnessed by Tengku

Ngah (Omar) bin Abdul Rahim, Wazir and Minister, the husband of the first plaintiff.

It would appear, therefore, that the Muslim law referred to in section 25 of the Civil Law Act, 1956 is the Muslim law professed and practised in the State of Trengganu subject to any rules in its administration that may be regulated by the State Laws of Trengganu. In particular, the Muslim law on *Wakaf* in Trengganu is subject to the provisions of the (Trengganu) Administration of Islamic Law Enactment, 1955 and the (Trengganu) Islamic *Wakaf* Validating Enactment, 1972. That, in my view, is the law, and I so hold.

I now turn to the instrument creating the *Wakaf*. It is the validity of this document that is in issue in these proceedings. It was executed at Kuala Trengganu on June 13, 1961 by the first plaintiff and witnessed by a Magistrate of the State of Trengganu. The original is in the Malay language and typewritten in the Jawi script and bears the following certificate by the Magistrate in English:

"Read over and explained to Tengku Nik by Hj. Embong Yusoff bin Ibrahim and admitted correct by her."

The first part of the instrument is a recital

(a) as to how the first plaintiff became the owner of 5/8 share of the Chenderong Concession;

(b) that it was leased by her to Cindee Development Ltd. on January 2, 1961 for a term of 999 years; and

(c) "With effect from the date of this letter, be it known that I, the undersigned Tengku Nik Maimunah Al-Hajjah binti Al-Marhum Al-Sultan Zainal Abidin, in sound mind and good physical health, wilfully and without force or pressure from anybody whatsoever, declare, affirm and witness that I dedicate (*wakaf*) in perpetuity all income and rights of interest derived from the 5/8 (five eighth) share of the said Chenderong Concession to those persons stated hereunder in accordance with the rates of distribution that I have stipulated for each person stated in pages 2-5".

"1. To my younger brother His Highness Al-Sultan Ismail Nasiruddin Shah, D.M.N. ibni Al-Sultan Zainal Abidin is granted 16/144 share which will remain his and subsequent to him on his death his children will be entitled to receive equal number of shares among them from that share and thereafter on their death their shares will be distributed to their respective descendants and on cessation of direct descent of any one of them his respective share will be returned to the poor and destitute persons among the Muslims, under the management and administration of the Islamic Affairs Department, Trengganu."

Then follows grants in identical terms to other brothers and sisters as follows:

"2. To my elder sister, Tengku Ngah Aishah Al-Hajjah binti Al-Marhum Al-Sultan Zainal Abidin is granted 24/144 share....

3. To my younger sister, Tengku Wok Aminah binti Al-Marhum Al-Sultan Zainal Abidin (Tengku Kesu'ma Puri) is granted 7/144 share....

4. To my younger brother, Tengku Ahmad ibni Al-Marhum Al-Sultan Zainal Abidin is granted 16/144 share....

5. To my younger brother, Tengku Besar Mahmud ibni Al-Marhum Al-Sultan Zainal Abidin (Tengku Seri Utama Raja) is granted 16/144 share...."

In identical terms also are grants to other relatives as follows: —

"6. Each of my following nephews and nieces respectively gets an equal share out of 8/144 share:—

1. Tengku Ali ibni Al-Marhum Sultan Sulaiman.
2. Tengku Abdul Aziz ibni Al-Marhum Sultan Sulaiman.
3. Tengku Abdul Rashid ibni Al-Marhum Sultan Sulaiman.
4. Tengku Abdul Rahman Al-Haj ibni Al-Marhum Sultan Sulaiman.
5. Tengku Asma' binti Al-Marhum Sultan Sulaiman.
6. Tengku Wok 'Atikah binti Al-Marhum Sultan Sulaiman.
7. Tengku Mariah binti Al-Marhum Sultan Sulaiman.
8. Tengku Azizah binti Al-Marhum Sultan Sulaiman ....

7. To my niece, Tengku Tengah binti Ex-Sultan Muhammed is granted 2/144 share....

8. To my niece, Tengku Puteri binti Tengku Muda is granted 2/144 share....

9. To my nephew, Tengku Embong bin Tengku Muda is granted 2/144 share....

10. To my grand nephew, Tengku Embong Abdullah bin Tengku Hitam Abdul Majid is granted 2/144 share....

11. To my great grand child, Tengku Ismail bin Tengku Abdul Aziz is granted 2/144 share....

12. To Tengku Teh binti Kharzaki is granted 1/144 share...."

Life interests only and then to the poor —

"13. To my nephew-in-law Tengku Su bin Hussain is granted 3/144 share....

14. Haji Embong Yusof b. Ibrahim is granted 3/144 share ...."

Then to 4 adopted daughters as follows: —

"15. Hajjah Mahani binti Sulaiman is granted 4/144 share until extinction by descent and then to the poor.

16. Hajjah Jawahir binti Abdullah 2/144 share in perpetuity until her grand-children and then to the poor.

17. Hajjah Mariam binti Mohammad, 2/144 share in perpetuity until her children and then to the poor.

18. Hajjah Mek Long binti Abdullah, 2/144 share for life and then to the poor.

19. Encik Embong bin Abu Bakar, 1/144 share for life and then to the poor."

The remaining shares are alloted to various religious and charitable objects, in all 22/144 shares.

The first plaintiff then appointed herself for life as controller of the *wakaf* with directions as to who should succeed her as controller after her death.

In the pleadings the plaintiffs claim that the *wakaf* is void on the grounds following:

That the first plaintiff retained control of the *wakaf* contrary to section 59 of the Administration of Islamic Law Enactment, 1955;

That there was a failure to vest in the Majlis Ugama dan Adat Melayu, Trengganu the property of the *wakaf* in accordance with section 60 of the Administration of Islamic Law Enactment, 1955; and

That the *wakaf* is contrary to Muslim law for the following reasons:

"(a) There is no clear and true dedication in perpetuity of the donor's interest for Islamic and/or charitable purposes.

(b) The dispositions contained in the alleged *wakaf* are subject to such uncertain contingencies as to invalidate the whole *wakaf*.

(c) Numerous uncertainties in the *wakaf* are contrary to Muslim Law which recognises the validity of only those *wakaf* that are capable of being justly administered.

(d) The disposition contained in the alleged *wakaf* is too illusory and remote and that it was solely created for the benefits of the first plaintiff's immediate relatives.

(e) The purported *wakaf* is void on the ground that it does not conform to the Muslim Law of *Wakaf*."

The defendants on the other hand contend:

(a) That the plaintiff in bringing this action for a declaration that her said *wakaf* is void is in effect attempting to revoke her own *wakaf*. Under Muslim law the plaintiff cannot revoke her own *wakaf* after the *wakaf's* dedication has been completed.

(b) That the said *wakaf* is valid and binding on the plaintiff by reason of the fact she is and was at all material times resident in the State of Trengganu and the validity of the *wakaf* was affirmed by a *fetua* (hereinafter called the *fetua*) of the Mufti of Trengganu and duly published pursuant to section 21(3) of the Administration of Islamic Law Enactment, 1955 in the *Government of Trengganu Gazette* as Notification No. 2 Volume 24 Supplementary No. 1 dated February 11, 1971.

(c) That the said *wakaf* is valid and binding on the plaintiff by virtue of the Islamic *Wakaf* Validating Enactment, 1972.

(d) That the present suit should have been commenced in the Court of the Chief Kathi in accordance with the Administration of Islamic Law Enactment, 1955 and not in the High Court and accordingly the High Court should not entertain this suit.

Control:

Section 59 of the Administration of Islamic Law Enactment provides: —

"Notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting the same, the Corporation shall be the sole Controller of all *wakaf*, whether *wakaf 'am* or *wakaf khas*, and all *nazar 'am*, and of all trusts of every description creating any charitable trust for the support and promotion of the Religion of Islam or for the benefit of Muslims in accordance with Islamic law, to the extent of any property affected thereby and situate in the State and, where the settler or other person creating the trust, *wakaf* or *nazar 'am* was domiciled in the State, to the extent of all property affected thereby wherever situate."

Section 2 defines:

"'*wakaf 'am*' means a dedication in perpetuity of the capital and income of property for religious or charitable purposes recognized by Islamic Law, and includes the property so dedicated;

'*wakaf khas*' means a dedication in perpetuity of the capital of property for religious or charitable purposes recognized by Islamic Law, and includes the property so dedicated, the income of which is to be paid to a person or persons or for purposes prescribed in the *wakaf*;

'*nazar 'am*' means an expressed vow made by a person creating an obligation upon himself to do any beneficial act for the benefit of the Muslim community generally or in part as distinct from an individual."

It seems to me that the words of section 59 are clear and notwithstanding the fact that the first plaintiff purported to retain control of the *wakaf*, the Majlis Ugama Islam dan Adat Melayu (i.e. the Corporation) by virtue of this provision became the controller the moment the first plaintiff created the *wakaf* on June 13, 1961.

Vesting:

As regards Vesting, section 60 of the Administration of Islamic Law Enactment provides:

"Section 60(1)(a) All property which on the coming into force of this Enactment is subject to the provisions of the preceding section shall if situate in the state vest in the corporation.

(b) Immovable property vested in accordance with sub-section (a) of this section may be recorded or registered in the name of the Corporation upon proof to the satisfaction of the Collectors that such land is so subject. The Collector may subject to his verification and so certifying accept in evidence lists of land so subject supplied by the Commissioner.

(2) Land which subsequent to the coming into force of this Enactment becomes subject to the provisions of the preceding section may be recorded or registered in the name of the Corporation upon presentation of a memorandum of transfer executed by the parties thereto or upon filing with the Collector an order of the Court, Civil Court or a Collector in a probate, administration or distribution suit.

(3) The Corporation shall take all necessary steps to vest in the Corporation for the like purposes any such property situate elsewhere than in the State."

It would appear, therefore, that once a *wakaf* becomes subject to the control of the Corporation the property vests in that Corporation although the memorandum of transfer has not yet been executed. Be that as it may, the pleadings concerning control and vesting were not pursued by the plaintiffs at the trial.

Tengku Mariam's Case:

The main issue then is whether the *wakaf* is void under Muslim law. It was contended by the plaintiffs that it is void on the authority of the Federal Court's decision in *Commissioner for Religious Affairs* v. *Tengku Mariam.*[1] That case also dealt with a *wakaf* created over the remaining undivided 3/8 share of the Chenderong Concession. Briefly, in that case the Mufti issued a *fetua* (ruling) under the provisions of the Administration of Islamic Law Enactment that the *wakaf* was valid but Wan Suleiman J. (as he then was) held that the *wakaf* was invalid: *Tengku Mariam binti Tengku Sri Wa Raja & Anor.* v. *Commissioner for Religious Affairs Trengganu & Ors.*[2] On appeal the Federal Court held that although the *wakaf* was invalid, the parties were estopped from challenging its validity as they or their predecessors had agreed to abide by the decision of the Mufti.

Muslim Law on Wakaf:

In the course of his judgment in *Tengku Mariam's* case, Tun Azmi L.P. (as he then was) said:

"Perhaps I should say a few words in reference to the judgments of the Privy Council in the Indian case of *Abdul Fata Mohamed Ishak* v. *Russomoy Dhur Chowdhry* and the Kenyan case of *Fatuma binti Mohamed* v. *Mohamed bin Salim.* In the Indian case the facts were that two Muslim brothers made a *wakaf* whereby they themselves were to be the first mutawallis of the *wakaf*. The entire benefit of the *wakaf* was to go to their children in the first instance and their descendants from generation to generation until the total extinction of the family. Thereafter the income of the *wakaf* was to be applied to the benefit of widows, orphans, beggars and the poor.

The results of their Lordships' judgment was that a *wakaf* was valid only if the effect of the deed of *wakaf* was to give the property in substance to charitable uses. It was not valid if the *wakaf* was founded 'for the aggrandisement of the family' or where the gifts to a charity was illusory or merely nominal. This decision created a storm in India as it was deemed to go against the fundamental notions of Islamic law. Finally the Indian legislature stepped in by passing the Mussalman *Wakaf* Validating Act 1913, which provides that *wakafs*

for the support of a man's descendants and family are proper and lawful and where the person creating the *wakaf* is a Hanafi Mussalman, it is also lawful for him to provide for his maintenance and support during his lifetime or for payments of his debts out of the rents and profits of the property dedicated, provided that in both cases the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

In 1951 their Lordships of the Privy Council in the Kenyan case of *Fatuma binti Mohamed* v. *Mohamed bin Salim* followed their own decision in the Indian case of *Abdul Fata Mohamed Ishak* v. *Russomoy Dhur Chowdhry*. Lord Simonds delivering the judgment of their Lordships cited a passage in the judgment of Hamilton J. in another East African case of *Talibu bin Mwijaka* v. *Executors of Siwa Haji Decd.* I will now cite only a part of the passage:—

'A study of the question shows that while the Mohamedan law, uninfluenced from outside sources, permitted perpetuities and the erection of *wakafs* for family aggrandizement solely, the influence of English judges and of the Privy Council has gradually encroached on this position until decisions given quite recently have decided that such *wakafs* are illegal, and it has now been clearly established that a *wakaf* for family aggrandizement or security, the ultimate beneficiaries of which are the poor, whether mentioned by name or supplied by implication, are invalid. The Mohamedan law in East Africa has, however, not been subjected to the same modifying influence as in India, and remains the same as when the Min Haj was written in the sixth century of the Hejira.'

Lord Simonds in reference to the above among other things says this:—

'But they cannot accept the theory which appears to underlie his (Hamilton J's) decision, that the interpretation of Mohamedan law given by this Board in a series of cases is confined to that law as applied or administered in India. On the contrary, it has not been suggested that, apart from the differences existing among the Shafi, Hanafi and other sects, which have no present significance, Mohamedan law is not the same in East Africa as in India. The appellants have themselves relied on its universality and invoke the text of the Koran and the writings of learned commentators who expounded the law not of East Africa or any part of it but of the whole Muslim world. In these circumstances their Lordships are as little justified in reviewing *Abdul Fata's* case in an appeal from the courts of Kenya as they would be in an appeal (if that were now possible) from the courts of India. In *Said bin Muhammad* v. *Wakaf Commissioner* already referred to, the experienced judges of the Court of Appeal for Eastern Africa did not doubt that on a question of Mohamedan law decisions of the Privy Council in appeals from India must bind them in appeals from the High Court of Zandibar. Their Lordships are of opinion that this was clearly the correct view and that it must prevail also in appeals from Kenya.'

The effect of the above would be that the Malaysian courts would also be bound by the judgment of the Privy Council in Abdul Fata's case. Whether that state of affairs should continue or not is a matter for the legislature."

Fetua:

In the instant case a *fetua* was also issued by the Mufti declaring the first plaintiff's *wakaf* valid but with this difference: neither of the parties requested for the *fetua* nor is there any agreement that any of them would abide by it. The plaintiffs contend that the *fetua* does not apply to this case as the second plaintiffs are not Muslims. The defendants, however, rely on the *fetua* as part of the defence. As far as this case is concerned, the court is bound by the decision of the Federal Court in *Tengku Mariam's* case in that the court is not bound by the *fetua* and as neither of the parties requested for such a *fetua* they too are not bound by it.

Validation:

The question arises whether the Muslim Law on *wakaf* in Trengganu has changed since *Tengku Mariam's* case. The Federal Court decision was delivered on February 9, 1970. Both Tun Azmi L.P. and Suffian F.J. (as he then was) said that it was up to the legislature to effect any change. It would appear that the legislature did indeed do so. On July 22, 1972, the State Legislative Assembly of Trengganu passed the Islamic *Wakaf* Validating Enactment, 1972 which became law on August 8, 1972. Section 2 of the said Enactment reads:

"2(1) It shall be lawful for any Muslim to create a *Wakaf* which in all other respects is in accordance with the provisions of Islamic Law, for the following amongst other purposes:

(a) For the maintenance and support wholly or partially of his family, children or descendants, and

(b) Where a person creating a *Wakaf* desires to follow the Hanafi Sect in respect of *Wakaf*, also for his own maintenance and support during his life-time and for the payment of his debt out of the rents and profits of the property dedicated.

Provided that the ultimate benefit is in such *Wakaf* expressly and impliedly reserved for the poor or for any other purpose recognised by Islamic Law as a religious, pious or charitable purpose of a permanent character.

(2) No such *Wakaf* shall be deemed to be invalid merely because the benefits reserved therein for the poor or other religious, pious or charitable purpose of a permanent character is small or not substantial or is postponed until after the extinction of the family, children or descendants of the person creating the *Wakaf*.

(3) No such *Wakaf* shall be deemed to be invalid merely because part of the benefits reserved therein is given to person or persons other than the family, children or descendants of the person creating the *Wakaf*."

It seems to me that the grounds relied upon by the plaintiffs that the *wakaf* is void have been completely nullified by the said Enactment. I therefore hold that the *wakaf per se* is valid.

Retrospective Legislation:

The instrument creating the *wakaf* was made on June 13, 1961. The Islamic *Wakaf* Validating Enactment, 1972 became law on August 8, 1972, that is eleven years later and about two years after the commencement of these proceedings. The question arises whether the new law applies to *wakaf* created before August 8, 1972. The answer seems to lie in section 3 of the Validating Enactment which reads:

"3. This Enactment shall apply to all *Wakaf* created in the State before its commencement:

Provided that nothing therein contained shall be deemed in anyway to affect any rights, titles, obligation or liability already acquired, accrued or incurred before the commencement of this Enactment."

There would appear to be a printing error in the proviso and "therein" should read "herein". In my view the words of the Enactment are plain. It applies to *all wakaf* created in the State *before* its commencement. In the instant case the *wakaf* created by Tengku Nik Maimunah has been validated by section 3 but subject to rights, titles, obligation or liability created before August 8, 1972.

Extent of Wakaf:

The matter, however, does not end there for section 61 of the Administration of Islamic Law Enactment reads:

"(61) Whether or not made by way of will or deathbed gift, no *wakaf* or nazar made after the commencement of this Enactment and involving more than one-third of the property of the person making the same shall be valid in respect of the excess beyond such one-third unless expressly sanctioned and validated by all beneficiaries."

This Enactment came into force on March 29, 1956. The *wakaf* was created on June 13, 1961 and therefore section 61 applies. There has been no express sanction and validation of the *wakaf* by all the beneficiaries of Tengku Nik Maimunah. Apart from the Chenderong Concession she had other properties. It follows that only a third of her property as on June 13, 1961 is a valid *wakaf*. This means that her other property has first to be added to the Chenderong Concession and one third of the whole but consisting part of the Chenderong Concession only is subject to the *wakaf*.

For these reasons, I declare that the *wakaf* created by Tengku Nik Maimunah on June 13, 1961 is valid to the extent of one third of her property as of that date.

Order accordingly.

Solicitors: *Kirpal Singh Brar & Co.; Chung & Huang.*

MANOKARAN & ANOR. v. PUBLIC PROSECUTOR

[R.Cr.J. (Abdoolcader J.) October 10, 1978]
[Penang — Criminal Appeals Nos. 47 and 48 of 1978]

Criminal Law and Procedure — Plea of guilty by accused — Appeal against conviction — Powers of High Court — Power of revision — Case originally brought before President of Sessions Court — Accused charged and pleaded guilty — Plea of guilty not accepted and case adjourned — Special President calling up case in his court — Special President acting suo motu — Accused pleaded guilty and convicted — Whether "transfer" legal — Impartiality of courts of justice — Fairness of trial — Subordinate Courts Act, 1948, s. 104 and Third Schedule, Paragraph 3(2) — Courts of Judicature Act, 1964, s. 35 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 305 and 325.

In this case the first appellant had been charged on two charges, one of criminal intimidation and the other relating to extortion; and the second appellant had been charged with two charges, abetment of the criminal intimidation by the first appellant and an alternative charge of conspiracy. The cases against the appellants were originally brought on June 2, 1978 before a President of the Sessions Court. The first appellant on being charged pleaded guilty to the two charges against him and then added that he was only making a joke. The learned President rejected his plea of guilty and adjourned the case for hearing on January 22, 1979. The second appellant on being charged claimed trial and the case against her was also adjourned for hearing on the same date. However on June 3, 1978 the Special President of the Sessions Court called up the cases against the appellants in his court. The appellants were charged and on their pleading guilty, they were convicted and sentenced, the first appellant to the maximum but concurrent term of 7 years on both charges and the second appellant to a term of 3 years' imprisonment on the substantive charge. The appellants appealed against their conviction and sentence.

Held: (1) in this case despite the plea of guilty by the appellants, it was open to the court to deal with the convictions in the exercise of its powers of revision if the circumstances of the case so warrant;

(2) there was no provision of law under which the Special President in this case could transfer the cases to himself and the transfer was therefore wrong and illegal and so were the convictions against the appellants;

(3) the convictions and sentences imposed on the appellants should be set aside and an order be made that the cases be tried before a Magistrate.

Cases referred to:-

(1) *Director of Public Prosecutions* v. *Shannon* [1975] A.C. 717.

(2) *R.* v. *Whitehouse* [1977] Q.B. 868.

(3) *In re Chunbidya & Ors.* (1934) 62 I.A. 36.

(4) *R.* v. *Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256, 259.

(5) *R.* v. *Essex Justices, ex parte Perkins* [1927] 2 K.B. 475, 488.

(6) *R.* v. *Thames Magistrates' Court, ex parte Polemis* [1974] 1 W.L.R. 1371, 1375.

CRIMINAL APPEAL.

Jag-Jit Singh for the appellants.

Hashim bin Datuk Haji Yusoff (Deputy Public Prosecutor) for the respondent.

Abdoolcader J. (delivering oral judgment): The cases against the 1st appellant, arraigned on two charges, one of criminal intimidation and the other relating to extortion, and the 2nd appellant, on a substantive charge of abetment of criminal intimidation by the 1st appellant and an alternative charge of criminal conspiracy, were called up on June 3 this year by the President of the Sessions Court conferred at the material time with special jurisdiction under section 63(3) (since repealed) of the Subordinate Courts Act, 1948, and on their plea of guilty and subsequent conviction the 1st appellant was sentenced to the maximum but a concurrent term of 7 years' imprisonment on both the charges preferred against him, and the 2nd appellant to a term of 3 years' imprisonment on the substantive charge. The appellants now appeal against both conviction and sentence.

Section 305 of the Criminal Procedure Code which is based on section 412 of the Indian Criminal Procedure Code of 1898 (since repealed and re-enacted in 1973) provides that there shall be no appeal by an accused person convicted on a plea of guilty except as to the extent or legality of the sentence. As a matter of passing interest, the position in England in this respect is statutorily governed by the provisions of section 2(1) of the Criminal Appeal Act, 1968 which afford only two grounds for an appeal against a conviction on a plea of guilty, namely, if there has been a wrong decision on a question of law or a material irregularity in the course of the trial. The law on this subject in England is fully discussed in the judgments of the House of Lords in *Director of Public Prosecutions* v. *Shannon*[1] in which there is a plea by two of the Law Lords to the effect that the scope of appeal against conviction in such an event should be extended to a case where the accused has pleaded guilty without understanding the nature of the charge or intending to admit that he was guilty. *Shannon*[1] was applied more recently in *Regina* v. *Whitehouse*[2] by the Court of Appeal in England.

I have however not only extensive powers of revision in criminal proceedings under the provisions of